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No. 76-1151

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH CECCOLINI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The government's petition presented two issues that we believe to be of substantial importance to the administration of the criminal law: (1) whether the exclusionary rule prevents the use of the fruits of an illegal search in a prosecution for perjury committed after the search; and (2) whether the exclusionary rule requires the suppression of the trial testimony of a witness whose identity or whose possession of relevant information was learned as the result of an illegal search. Respondent opposes the petition principally on the basis of his contention, which the court below rejected (Pet. App. 7a), that the Double Jeopardy Clause barred the government's appeal from the judgment of the district court. This reply memorandum is addressed primarily to that contention.

1. The court of appeals correctly concluded that the Double Jeopardy Clause did not bar the government's appeal from the action of the district court setting aside its finding of guilty, since a successful appeal by the government would not require a retrial but merely the entry of a judgment on the finding. *United States* v. *Jenkins*, 420 U.S. 358, 365; *United States* v. *Wilson*, 420 U.S. 332, 334-345. "[W]here a government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended." *United States* v. *Martin Linen Supply Co.*, No. 76-120, decided April 4, 1977, slip op. 5.[1] Indeed, in *United States* v. *Morrison*, No. 75-1534, decided October 12, 1976, *United States* v. *Rose*, No. 75-1535, October 12, 1976, and *United States* v. *Kopp*, No. 75-1536, decided December 6, 1976, this Court specifically held that the government can appeal the grant of a suppression motion made after the return of a guilty verdict.

In this case the district court carefully and deliberately reserved its ruling on respondent's motion to suppress the testimony of Lois Hennessey and on his motion for judgment of acquittal until after it had found respondent guilty. Only then did it set aside the finding on the basis of the conclusion that the testimony was tainted by the illegal search (Pet. App. 26a, 28a, 32a, 36a).

There is no basis for respondent's contention (Br. in Opp. 8) that the district court's actions were the "functional equivalent" of granting respondent's suppression motion before the finding of guilt and entering a judgment of acquittal based on the insufficiency of the evidence. As the court of appeals noted (Pet. App. 6a-7a), a

[1]Respondent's contention (Br. in Opp. 10) that *Martin Linen* supports his position is unfounded. The Court pointed out (slip op. 5) that the protections of the Double Jeopardy Clause are not animated unless two "threshold conditions"—including the prospect of a second trial—are satisfied.

district court has discretion either to rule on a suppression motion prior to trial (in which case the government could appeal a grant of the motion under 18 U.S.C. 3731), during trial, or, as here, to defer its ruling until after the verdict. Fed. R. Crim. P. 12(e). Indeed, since the admissibility of evidence is solely a question of law, the procedure followed by the district court, enabling the government to appeal its ruling of law, was clearly the appropriate one.[2]

2. Respondent answers our contention that the exclusionary rule should not prevent the use of the fruits of a search in prosecuting perjury committed after the search by arguing that because he did not know when he testified that the government had information about his gambling, it is somehow unfair to punish him for lying to the grand jury about it (Br. in Opp. 15-17). That argument merits little response beyond the observation that it raises nothing relating to the deterrent policies underlying the exclusionary rule. Whether a grand jury witness knows or does not know of a prior search obviously can have had no bearing on the decision of the police officers to conduct the search.

3. Respondent replies to our objection to the court of appeals' automatic exclusion of the testimony of a live witness by arguing that suppression of verbal evidence describing the fruits of an illegal search has always been encompassed by the exclusionary rule (Br. in Opp.

[2]In the circumstances of this case, the appropriateness of deferring the ruling of law until after the trial and thus permitting appeal of the legal issue constitutes "good cause" under Rule 12(e). Moreover, when respondent's counsel made his suppression motion at the outset of the trial, he explicitly stated that he had no objection to having the trial and the suppression issues proceed together (Tr. 17; see Tr. 187-188).

18-19). The argument misses the point. As the decisions cited in the petition (Pet. 14-18) recognize, there is an obvious and significant distinction between testimony that merely describes the evidence discovered by an illegal search and testimony by a knowledgeable witness about other matters wholly unrelated to the search. Certainly the exclusion of the former is a necessary adjunct of the exclusionary rule. But the blanket exclusion of testimony about other matters by a witness whose identity was discovered as a result of a search is not necessary to effectuate the purposes of the exclusionary rule, and, as our petition demonstrates, such testimony should not be mechanically suppressed as the fruit of an illegal search.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1977.

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